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No. ~~29010~~

In the

United States Court of Appeals

For the Ninth Circuit

ELIJAH DU BOSE,
Plaintiff,

vs.

MATSON NAVIGATION COMPANY,
Defendant.

Brief of Appellee Matson Navigation Company

E. JUDGE ELDERKIN,
BROBECK, PHLEGER & HARRISON
111 Sutter Street,
San Francisco, California 94104

Attorneys for Appellee Matson Navigation Company

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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JURISDICTIONAL STATEMENT

Jurisdiction of the court below is granted pursuant to the provisions of the Jones Act, 46 USC, Section 688, and under the general maritime law. The jurisdiction of this court is granted by the provisions of Title 28 USC 1291, which gives to this court jurisdiction of all appeals from final decrees of District Courts of the United States.

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PRELIMINARY STATEMENT

The Court below, after a complete hearing on the merits, rendered a judgment which, assuming that any award should have been made, amply compensated appellant. The appellant's real complaint before this Court is not lack of adequate compensation for a minor injury but is rather an attack on the District Court's use of the standard admiralty formula of applying comparative negligence in arriving at the ultimate award. We will show that the trial court properly found the appellant guilty of contributory negligence, and that the amount awarded was adequate, if not generous.

STATEMENT OF THE CASE

There appears no real reason for a lengthy statement of the case, save to set forth the facts upon which the trial court correctly rested its finding of contributory negligence.

Appellant was an experienced seaman who had been going to sea since 1943 (R.T. p. 5, lines 4-14).* He signed aboard the *SS Matsonia* on January 28, 1961 and remained aboard the vessel until April 5, 1961 (R.T. p. 6, lines 19-20). Appellant left the vessel in April only because he had served the maximum time aboard and therefore was removed by the Union (R.T. p. 100, lines 7-15).

Appellant worked as one of a number of scullions aboard the vessel and was assigned the specific task of polishing silver (R.T. p. 7, lines 12-23). During the course of his employment, other scullions carrying dish racks passed behind appellant while he worked. On many occasions these scullions would bump their dish racks against appellant's right knee causing injury (R.T. p. 28, lines 9-25). On one occasion appellant received a particularly hard bump on his right knee from a seaman by the name of Calvin Jerry (R.T. p. 54, lines 4-9). Finally, in early March of 1961, appellant went to the doctor aboard the vessel and complained of the injury to his knee (R.T. p. 33, lines 17-21).

On March 13, 1961, appellant went to the Public Health Service Hospital in San Francisco complaining of the injury to his knee (Appellant's Exhibit 4). Appellant returned to the vessel and continued working until required to leave by the Union rule.

Appellant testified that he never complained to his Union delegate about the repeated trauma which caused the injury

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*Reference to the Reporter's Transcript is "R.T."
Reference to the Clerk's Transcript is "C.T."
Reference to Appellant's Brief is "B.R."

(R.T. p. 102, lines 11-13). He never reported the bumping incidents to any of the ship's officers (R.T. p. 102, lines 14-15). He never requested to be transferred to another job (R.T. p. 102, lines 7-10). Finally appellant admitted that he was not required to stay on the vessel and could have gotten off any time the vessel reached port. He did not do so until required to by his Union (R.T. p. 104, lines 17-21).

Appellant's earnings' record* was as follows:

1960	$1,510.18
1961†	$1,800.05
1962	$2,862.39
1963	$3,333.70
1964	$3,928.63
1965	$3,450.50
1966	$4,444.00

Appellant sought no medical treatment of any kind after 1962 (Appellant's Exhibit 4); as the above earnings record indicates, he worked more after the accident than he did before.

Based on the foregoing, the Court, although concerned about both liability and causation, entered an award in favor of the appellant, but reduced the award 75% for contributory negligence (R.T. pp. 115-118). In arriving at the amount of the judgment, the Court stated:

> "I am going to work with the figures offered me by counsel for the plaintiff, formerly 'proctor' for the libelant. For a number of reasons, if I work with those figures, I think it is not unfair to assess a very, very substantial charge of contributory negligence against the plaintiff (R.T. p. 117, lines 9-14)."

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*Appellant's Exhibit 7; R.T. p. 47, lines 8-11; R.T. p. 100, lines 21-23.

†The year of the accident.

ARGUMENT

A Judgment Should Not Be Set Aside Unless It Is Clearly Erroneous.

The trial court specifically found that the appellant was 75% contributorily negligent. This finding was made on the basis of uncontroverted and undisputed facts. The burden is on the appellant to show that the findings of the trier of fact are clearly erroneous. *Clinton v. Joshua Hendy Corp.,* 264 F.2d 329 (9th Cir. 1959). In *Kulukundis v. Strand,* 202 F.2d 708, 709-710 (9th Cir. 1953), this Court noted that it is limited in the scope of review "by the general rule, in admiralty proceedings, that the findings are not to be disturbed where they are supported by substantial evidence and are not clearly erroneous." Since there is no question but what the findings are supported by substantial and undisputed evidence, the only question before this Court is whether it wishes to substitute its judgment for that of the trial court with regard to the amount awarded this appellant.

The Trial Court Properly Found Appellant Guilty of Contributory Negligence.

Appellant signed on the *SS Matsonia* on January 28, 1961, and got off April 5, 1961, because his Union limited the sailing time of its members. He claimed that he was bumped repeatedly by various dishrunners and that, as a result of such bumping, he sustained injury to his right knee. Appellant was aware of the continued trauma and the injury. He was also aware that because of the route which the dishrunners took that he would be continually subjected to such trauma unless he did something about it. Nevertheless:

(1) He never requested to be transferred to another job;

(2) He never complained about the "repeated trauma" to his Union delegate;

(3) He never reported the incidents nor made any complaints to any of the ship's officers; and

(4) He did not choose to get off the vessel even though he had complete freedom to do so.

Based on all of these factors, the trial court found appellant contributorily negligent.

Appellant's counsel complains that appellant "was in error when he testified (as he did) that he could have left the vessel 'at any time' " (Br. p. 14). It is then claimed that the Court "must take judicial notice of the fact that when a seaman is aboard a vessel and on articles, he cannot leave the vessel without penalties" (Br. p. 14). What appellant fails to point out is that the *SS Matsonia* made coastwise trips between Los Angeles, San Francisco and Honolulu. Approximately every twenty days the voyage ended and new articles were signed by those seamen who wished to remain aboard. Accordingly, appellant had a number of opportunities to get off the vessel had he desired to do so.

Appellant next complains that he was under no duty to cease working in an area that he knew was causing him repeated injuries. The law is to the contrary. It has been held that where a maritime worker continues to work under conditions known to be dangerous, he may be found contributorily negligent. *Misurella v. Isthmian Lines, Inc.,* 215 F.Supp. 857 (S.D.N.Y. 1964); affirmed 328 F.2d 40 (2nd Cir. 1964). There plaintiff entered a hold knowing it would fill with carbon monoxide fumes from a machine located there. He requested that the blower be put on, but the ventilating system was never put into operation during the episode. Although he was aware of the condition and knew that his fellow employees periodically went up for fresh air, plaintiff worked for one and one-half hours, whereupon he felt nauseous and dizzy and had difficulty breathing. He worked

another hour and finally collapsed from monoxide poisoning. The court held that the defendant was negligent and breached its warranty of seaworthiness in not making a ventilating system available at the proper time. However, the court found the plaintiff contributorily negilgent, stating:

> "It may seem rather odd to hold him liable because he persisted in sticking to his job, but under all the circumstances it was reasonable to require him to forego his task and follow the example of his co-workers. The Court finds that the amount of damages should be reduced to the extent of 50% by reason of plaintiff's contributory negligence." 215 F.Supp. 857 at p. 861.

Likewise, in *Crickett SS Co. v. Parry,* 263 Fed. 523 (2d Cir. 1920); certiorari denied, 252 U.S. 580 (1920), a seaman voluntarily sailed on a vessel he knew to be unseaworthy in that there were dangerous conditions aboard the vessel. The court held that there was no defense of assumption of risk but that the jury was properly charged that the plaintiff could be found contributorily negligent.

Appellant claims that the Court confused assumption of risk with contributory negligence. Assumption of risk was not pleaded nor was it ever injected into the case. What the Court found was that the plaintiff was negligent for three reasons:

(1) He never reported the incident to anyone;

(2) He never requested to be transferred to another job; and,

(3) He did not get off the vessel although he was free to do so.

Koshorek v. Pacific RR Co., 318 F.2d 364 (3d Cir. 1963), cited by appellant at pages 10 and 11 of his brief, stands merely for the proposition that where a plaintiff worked

under conditions that he knew or should have known, were dangerous, such conduct of the plaintiff might have constituted either contributory negligence or assumption of risk, or both. Therefore, instructions on both doctrines should have been given.

Appellant cites *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424 (1939), as authority for the proposition that assumption of risk has no place in maritime law (Br. pp. 12, 13). What the Court said was that "Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine, contributory negligence, however gross, is not a bar to recovery but only mitigates damages." 305 U.S. at p. 431. This rule has been reaffirmed in this Circuit in *Kulukundis v. Strand,* 202 F.2d 708 (9th Cir. 1953).

Appellant cites three cases for the proposition that the fact that he knew of the defective working conditions does not justify a finding of contributory negligence against him. (*Smith v. United States,* 336 F.2d 165 (4th Cir. 1964); *Movible Offshore Co. v. Ousley,* 346 F.2d 870 (5th Cir. 1965); *Hildebrand v. United States,* 134 F.Supp. 514 (S.D. N.Y. 1954) affm'd. 226 F.2d 215 (2d Cir. 1955). A careful reading of each of these cases clearly indicates that they stand for exactly the opposite. In *Hildebrand,* the court found no contributory negligence because the defective rungs on the ladder which were known to plaintiff to be defective did not in any way contribute to the accident. However, the court stated "If libellant's injuries had been occasioned, in some way, . . . (by the defective condition) then the situation would have been quite different" (134 F.Supp. at 518). In *Movible Offshore Co.,* there was a finding that plaintiff's negligence had contributed 30% to his

injury. The court's opinion indicates that such contributory negligence could have resulted from the fact that the plaintiff was aware that the derrick upon which he was working was in some way defective. There is a clear holding in *Smith* that a plaintiff can be held contributorily negligent where he deliberately continues an unsafe course of conduct where he has an alternative that is safe.

Appellee was found negligent, and the vessel was unseaworthy, solely because its officers failed to discover that appellant was being bumped and failed to reroute the scullions working as dishrunners (Finding of Fact 7; C.T. p. 78, lines 19-23). If the liability of the vessel hinged solely upon the fact that the ship's officers did not discover the injury or the "condition," is it unreasonable to hold the appellant who was the only one who had actual knowledge of the injury and the "condition" likewise negligent?

The Court's Finding That Appellant Was Guilty of Contributory Negligence in the Amount of 75% Is Clearly Within the Court's Discretion.

The amount of damages to be awarded a plaintiff in a maritime personal injury suit is basically within the discretion of the trial court. As we have already pointed out above, there was clearly no abuse of discretion in fixing appellant's award here. In *Asaro v. Parisi,* 297 F.2d 859 (1st Cir. 1962), an assessment of 75% contributory negligence was affirmed even though the plaintiff had acted in an emergency which was not created by his own antecedent negligence. See also *Dayton v. Midland SS Lines,* 110 F. Supp. 418 (75% contributory negligence); *Dixon Admx. v. Serodino,* 331 F.2d 668 (6th Cir. 1964) (85% contributory negligence); *Superior Oil Company v. Trahan,* 322 F.2d 234 (1st Cir. 1964) (75% contributory negligence).

CONCLUSION

After careful consideration and a full review of all the circumstances, appellant received an award which, under the circumstances, was most generous. The finding of contributory negligence is supported by the undisputed facts in the record. Accordingly, the District Court's decision should be affirmed.

Respectfully submitted,

BROBECK, PHLEGER & HARRISON
By E. JUDGE ELDERKIN
E. Judge Elderkin
Attorneys for Appellee Matson Navigation Company

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

E. JUDGE ELDERKIN